



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Marbex, Inc.
File: B-225799
Date: May 4, 1987

DIGEST

1. Trade Agreements Act does not prohibit acquisition of domestic products in procurements to which it applies; rather, the purpose of the Act is to forgo preference for domestic products over foreign ones where a specified group of foreign countries is involved.
2. Surgeon's gloves produced outside the United States are foreign end products under the Trade Agreements Act despite sterilization of the gloves in the United States since (1)--sterilization involves treatment of the finished product only without materially altering the form of the gloves and therefore does not constitute manufacture in the United States; and (2) there is no showing that the gloves are made using domestic components whose cost exceeds 50 percent of the total cost of the components.
3. Bid was properly rejected as nonresponsive for offering nondesignated country products which could not be accepted pursuant to the Trade Agreements Act where bid offered products manufactured in both designated and nondesignated countries.

DECISION

Marbex, Inc. protests the award of a contract to any other bidder under invitation for bids (IFB) No. DLA120-86-B-1837, issued by the Defense Logistics Agency (DLA) for surgeon's gloves. Marbex contends (1) that DLA improperly rejected its bid as nonresponsive for failing to meet the requirements of the Buy American Act and the Trade Agreements Act; and (2) that the awardee's bid could not be accepted consistent with the Trade Agreements Act. We deny the protest.

The IFB, issued on August 27, 1986, called for six line item bids for various estimated quantities and sizes of surgeon's gloves. Three bids were received at bid opening on September 26. American Pharmaseal was the low bidder for line item No. 3 and received the award for that item.

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Marbex's bid was low for the five other line items. DLA found Marbex's bid nonresponsive, however, because it offered a nonqualifying foreign end product that could not be accepted under the Trade Agreements Act. Award for four of the five line items on which Marbex's bid was low then was made to Smith & Nephew Medical, the next lowest bidder. No award was made for the other line item since only Marbex had submitted a bid.

Marbex contends that the successful bids were nonresponsive because the bidders offered domestic rather than foreign end products, which DLA was precluded from accepting by the Trade Agreements Act. In the alternative, Marbex argues that, assuming a domestic end product was acceptable, its product qualifies as such. We find Marbex's arguments to be without merit.

Although the Buy American Act, 41 U.S.C. §§ 10a-10c (1982), was enacted to establish a legal preference for domestic products over foreign ones in government procurement, the later-enacted Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2582 (1982), was intended to forgo the preference where a specified group of foreign countries is involved; in essence, the Trade Agreements Act puts designated foreign end products on an equal footing with domestic end products for price evaluation purposes. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.225-9(a), (b) (1985); Leland Limited, Inc., B-224715, Dec. 24, 1986, 86-2 CPD ¶ 713. Contrary to Marbex's assertion, there is nothing in the Trade Agreements Act which prohibits the acquisition of domestic end products in procurements to which the Act applies.

The IFB incorporated two standard provisions relating to the Buy American Act and the Trade Agreements Act.^{1/} Paragraph K33 of the IFB, entitled "Buy American-Trade Agreements-Balance of Payments Program Certificate," required bidders to specify the country of origin of any foreign end product offered under the IFB. Marbex inserted "all-see enclosure" under paragraph K33 in its bid, referring to an enclosure to its bid which listed both Israel and Thailand as the place of manufacture, with sterilization of the gloves to follow either in Israel for the Israeli items, or the United States for the items from Thailand; biological testing in the

^{1/}Pursuant to the Department of Defense (DOD) FAR Supplement, 48 C.F.R. § 225.407 (1985), the IFB incorporated the version of the two clauses appearing at 48 C.F.R. §§ 52.225-7005 and 52.225-7006.

United States; and immediate packaging in either Israel or Thailand, with preparation for final shipment in the United States.

In relevant part, the Trade Agreements Act and the implementing regulations prohibit the purchase of certain listed foreign products if they do not originate in a designated country and the total bid price exceeds an established dollar limit. See FAR, 48 C.F.R. §§ 25.402(c) (1986) and 52.225-9(b). As Marbex recognizes, Israel is a designated country for purposes of the Trade Agreements Act; Thailand, the other country listed in Marbex's bid as the place of manufacture, is not. FAR, 48 C.F.R. § 25.401. Since Marbex offered to provide foreign end products from a nondesignated country and its bid exceeded the applicable dollar limit,^{2/} DLA concluded that it could not accept Marbex's bid.

Marbex argues that the contracting officer should not have questioned the origin of its products since the reference in paragraph K33 of its bid to the enclosure showing the place of manufacture as outside the United States was a "patent error" in the bid. Instead, Marbex contends that the gloves it offered which originate in Thailand constitute domestic-- rather than foreign end products because sterilization of the gloves will take place in the United States. We find these arguments to be without merit.

In our view, there is nothing in its bid to support Marbex's argument that the statement in paragraph K33 was an error; on the contrary, paragraph K33 of its bid clearly indicates that Marbex itself considered the gloves it offered to be foreign end products. At a minimum, since the bid showed that manufacture would take place outside the United States, which Marbex concedes to be accurate, it clearly was proper for the contracting officer to examine whether the products offered met the requirements of the Trade Agreements Act.

Under FAR, 48 C.F.R. § 52.225-9(a), a domestic end product for purposes of the Trade Agreements Act is defined in pertinent part as:

"an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components."

^{2/}According to DLA, the dollar limit is \$171,000; Marbex's bid for all the items was more than \$4 million.

Marbex's products clearly do not meet the requirement that the manufacturing be done entirely in the United States since production of the gloves is to take place in Thailand. Further, Marbex has made no showing that its products meet the second criterion for domestic end products, use of domestic components the cost of which exceeds 50 percent of the total component cost.

To the extent Marbex argues that sterilization constitutes a separate manufacturing stage independent of the actual production of the gloves, its argument is without merit. We have interpreted the term "manufacture" to mean completion of the article in the form required for use by the government. See 46 Comp. Gen. 784, 791 (1967). Here, the sterilization operation involves treatment of the finished product only; it does not materially alter the form of the gloves so as to constitute a separate manufacturing operation. Compare 48 Comp. Gen. 727 (1969) (packaging, evaluation and testing of completed products do not constitute manufacturing) with Hamilton Watch Co., Inc., B-179939, June 6, 1974, 74-1 CPD ¶ 306 (assembly in U.S. of watch movements using foreign-manufactured parts constitutes domestic manufacture of the complete movement).

Accordingly, we find that the products from Thailand which Marbex offered constitute foreign end products from a non-designated country, not domestic products. Since Marbex's bid offered products originating in both a designated country (Israel) and a nondesignated country, DLA properly regarded Marbex as offering a nonqualifying product under the Trade Agreements Act. Trail Equipment Co., B-205026, Jan. 27, 1982, 82-1 CPD ¶ 63. As a result, Marbex's bid was properly rejected as nonresponsive for failing to meet the requirements of the Trade Agreements Act. The W.H. Smith Hardware Co., B-219405.2, Oct. 25, 1985, 85-2 CPD ¶ 460.3/

3/After bid opening and before award, Marbex submitted a letter to the contracting officer changing the place of sterilization for its Thai products from the United States to Thailand. In its protest, Marbex disavows any intention to change the place of sterilization and states that its letter should be ignored. Since we find that Marbex's bid as originally submitted offered a product from a nondesignated country and therefore was properly rejected, we need not consider the significance of Marbex's post-bid opening letter.

The protest is denied.

for Seymour E. Van
Harry R. Van Cleve
General Counsel